FINAL STATEMENT OF REASONS:

This action amends provisions governing Incompatible Activity concerning employees of the California Department of Corrections and Rehabilitation (Department) serving as expert witnesses. This action clarifies the processes for notification and approval when an employee is subpoenaed as an expert witness for the purpose of eliciting testimony based upon expertise gained in the course of employment with the Department. Furthermore, this action adopts provisions regarding departmental compensation when any state employee who is obliged by such subpoena to attend as an expert witness.

This action also makes non-substantial changes to existing language correcting the typographical errors in numbering specific subsections and makes language consistent throughout the section.

This regulation clarifies that employees of the Department shall not engage in any other employment or activity inconsistent or incompatible with employment by the Department. Any employee who has been identified, or requested to participate as an expert witness using expertise gained in the course of his or her duties with the department, shall notify in writing the Chief Deputy General Counsel of the Office of Legal Affairs. Additionally, upon receipt of the employee's written notification of required testimony, the Chief Deputy General Counsel of the Office of Legal Affairs shall determine if there is a need to quash the subpoena.

This regulation adopts language pursuant to Government Code (GC) Sections 68097.1, 68097.2(a) and (b) regarding compensation to which they are normally entitled from the Department during the time they travel to and from the place where the court or other tribunal is located, and while they are required to remain at that place pursuant to the subpoena. Additionally, the employee shall also receive from the Department the actual necessary, and reasonable traveling expenses incurred by him or her in complying with the subpoena.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has made a determination that the action does not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective, and less burdensome to affected private persons than the action proposed.

Subsection 3413(a) is adopted to include language that reinforces the departmental rules and procedures regarding incompatible activity. Existing language states that no employees will engage in any other employment or activity inconsistent or incompatible with employment by the Department. The words "no employee…. will engage" are being changed to "employees…shall not engage…." This change is necessary to clarify that employees of the Department are expressly prohibited from serving as an expert witness when the content of the expert testimony

is from experience gained at work, and shall not engage in such activity or other employment that is inconsistent or incompatible with employment by the Department.

Subsection 3413(a)(1) is adopted to change the wording from "Department of Corrections" to "department." This is necessary to make language consistent throughout this section.

Subsection 3414(a)(3) is adopted to include language regarding potential conflict or appearance of a conflict of interest with the employee's job as a category of activity inconsistent or incompatible with department employment.

Subsection 3413(a)(4) is unchanged.

Subsection 3413(a)(5) is deleted.

Subsection 3413(a)(6) and (7) is renumbered to (5) and (6), respectively.

Subsection 3413(a)(6)(A)(1) through (3) is renumbered to (A)1 through 3 to correct a non-substantial typographical error.

Subsection 3413(a)

Subsection 3413(a)(6)(A)(4) is deleted.

Subsection 3413(a)(6)(B) is amended to change the upper case "D" in the word Department to a lower case "d". This is necessary to make language consistent throughout this section.

Subsection 3413(a)(6)(C) through (a)(6)(H) is unchanged.

Subsection 3413(a)(8) through (11) are numbered to (a)(7) through (a)(10), respectively and (10) is amended to state that departmental employees who are consulting or testifying as a specialist or an expert witness, specifically, based on expertise gained in the course of their duties without having given reasonable notice to the Chief Deputy General Counsel of the Office of Legal Affairs is now clarified that it is included in the category of incompatible activity. This is necessary because employees, who are deemed "expert witnesses" merely because of expertise gained in the course of their duties with the Department and are subpoenaed to testify, are providing unauthorized testimony, and creating an inappropriate conflict of interest between their employer and the initiator of the subpoena. Often times these employees are subpoenaed to testify against the Department in regard to policies and procedures, and departmental employees who have provided training or to whom the "expert witness" has trained in the course of their duties. This testimony is often times not consistent or not reflective of actual departmental policies and procedures.

New subsection 3413(a)(10)(A) through 3413(a)(10)(C) is adopted to specify the process by which an employee, who receives a subpoena issued for the purpose of eliciting testimony, as defined in Evidence Code section 720, shall follow. The employee, shall within one (1) business day of receipt of service of the subpoena, notify in writing the Chief Deputy General Counsel of the Office of Legal Affairs; including all relevant information concerning the contact and a synopsis of their anticipated testimony.

Additionally, this subsection makes clear that the Chief Deputy General Counsel of the Office of Legal Affairs, or designee, retains the discretion to seek to quash the subpoena on any

substantive or procedural grounds before the judicial body through whose authority the subpoena was issued.

This language is necessary to ensure the process set forth in GC Section 68097.1, specifically pertaining to "other state employees…required as a witness before any court…in any civil action or proceeding in connection with a matter, event or transaction concerning which he or she has expertise gained in the course of his or her duties…." This regulation aids the "subpoenaed expert witness" in following the process set forth by statute and the Department. Additionally, this regulation is specific to "expert witnesses," and does not apply to employees who are actual witnesses to an event, subpoenaed because of what they perceived or investigated in the course of their duties or when an employee has been requested to testify as an expert witness by the department.

Subsection 3413(b) is amended to add language regarding the reporting of incompatible activity when the employee is self-employed. This is necessary due to the fact that there are licensed professionals employed with the Department who also maintain their own businesses. These individual's businesses are considered outside employment or an enterprise, and therefore, they must submit all pertinent information pursuant to this subsection.

Subsection 3413(c) is amended to include the words "with the department," to make clear that if violations of the provisions occur, then termination of employment specifically with the Department may result.

The Heading for new Section 3413.1 is adopted to read, Compensation for Witnesses.

New subsections 3413.1(a) through (c) are adopted to make specific GC Section 68097.2. Pursuant to GC Section 68097.2(a), any state employee who is obliged by a subpoena to attend as a witness before any court or other tribunal in any civil action or proceeding in connection with a matter, event or transaction which he or she has expertise gained in the course of his or her duties, shall receive the salary or other compensation to which he or she is normally entitled from the Department during the time they travel to and from the place where the court or other tribunal is located and while they are required to remain at that place pursuant to the subpoena. Additionally, the employee shall also receive from the Department the actual, necessary, and reasonable traveling expenses incurred by him or her in complying with the subpoena.

Furthermore, GC Section 68097.2(b) the Department shall require: (1) an amount of up to one hundred fifty dollars ($150) to accompany the subpoena of an "expert witness" upon delivery to the person accepting the subpoena for each day that the state employee is required to remain in attendance pursuant to the subpoena; (2) the party who requested the subpoena be issued to reimburse the Department for the full cost incurred in paying the State employee's salary or other compensation and traveling expenses for each day required by the subpoena; and (3) any employee who meets the requirements of subsection 3413.1(a) shall submit to his or her immediate supervisor an itemized travel expense claim within two (2) business days of his or her testimony. This is necessary to ensure that statute is adhered to and that during the fiscal crisis of the State that all money paid to departmental employees is recovered when they are approved by the Department as "expert witnesses."

New subsection 3413.1(d) is adopted to make specific GC Section 68093 regarding witness fees received by an employee who is subpoenaed to testify as to what they witnessed, not for their expertise gained in the course of their employment with the Department. These employees are not "expert witnesses." The fees shall be relinquished to the department if the employee has been on pay status during the duration of their testimony. Additionally, pursuant

to Title 2, Division 5, Section 18674, Witnesses at a hearing or investigation are entitled to the same fees as are allowed witnesses in civil cases in courts of record. If a witness is subpoenaed by the accused, or any person other than a State agency, the fees and mileage shall be paid by that person and are not proper charges against any State fund. This is necessary to ensure that statute is adhered to and that during the fiscal crisis of the State that all money paid to departmental employees who testify as witnesses while on pay status, is recovered by the Department.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

PUBLIC HEARING COMMENTS:

Public Hearing: Held April 24, 2006, at 10:00 a.m.

No one commented at the Public Hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

Commenter #1:

Comment A: Commenter states that these regulations serve no legitimate public service and have a 'chilling effect' on free speech between employees. Commenter further contends that the mandate for an employee who is contacted by a fellow employee, or their representative or attorney, must notify the Chief General Counsel with in one business day and disclose all relevant information allows the department to enforce a "Code of Silence" through theses regulations.

Accommodation: None.

Response A: The Department disagrees. These regulations will not "have a chilling effect on free speech" between employees, nor will they implicate any "Code of Silence." The regulations apply solely to non-percipient witnesses, not to witnesses who are being called to testify regarding an event or transaction which he or she has perceived or investigated or [have] been requested to testify as an expert witness by the department. Consequently, non-percipient witnesses have no direct knowledge of the matter for which he or she is being called to testify. In order for the Chief Deputy General Counsel (CDGC) to assess whether there is an incompatible activity involved, and whether an

attempt should be made to quash the subpoena, it is necessary for the CDGC to know why the individual is being called to testify. That information can be contained in a synopsis of their anticipated testimony.

Comment B: Commenter states it is when an employee provides expert witness assistance in litigation against his/her employer it is, according to the commenter, "clearly a conflict of interest". However the commenter contends that the proposed regulations would stifle honest employees who may have evidence that may be necessary to ferret out misconduct on the part of department supervisors and managers. Commenter states that there is no other reason for the proposed regulations than to stifle employee speech which is protected under the First Amendment, and to provide the department an intelligence gathering system regarding exposure that may exist to administrative, civil, or criminal actions.

Accommodation: None.

Response B: See this Commenter, Response A. In addition, the department contends that the parties issuing subpoenas cannot use this process as a fishing expedition. If the individual is not a percipient witness, then the department, as the employer who is paying to release the individual from service, has a right to know the purpose of the testimony to determine whether there are grounds for quashing the subpoena or seeking reimbursement of compensation.

Comment C: Commenter states that the department already has a well documented history of concealing, and destroying evidence, and retaliating against employees who speak out in civil, criminal, and administrative actions. The commenter contends that the regulations will intimidate well-intentioned employees from speaking out

Accommodation: None.

Response C: The commentary's allegations about the department's history are not relevant to the current regulatory language, or to the current department that has publicly dispraised any "Code of Silence." Additionally, the department disagrees that these regulations will "intimidate well-intentioned employees from speaking out". These regulations mandate that an employee who is subpoenaed to testify as an expert witness first notify his or her employer and centralizes that reporting to the CDGC in the Office of Legal Affairs. It can be assumed that these individuals have come forward knowing (or were later informed) that they would be testifying publicly at some point. If the employee is timid about testifying, he or she will make the decision about coming forward at a much earlier time than when they discuss their information with a party or receive the subpoena. The employer will learn the identity of "well-intentioned employees" who are being called to testify at the time of the testimony. Merely putting the employer on early notice of such testimony should have no effect on their initially coming forward.

Comment D: Commenter states that proposed section 3413.1 is unnecessary because it is a duplicate of statute. Additionally commenter points out that the proposed regulations 3413.1 (b) is incorrect in that it references Government Code 68087.2 (b). Commenter states that he assumes the department intended to site Government Code 68097.2 (b).

Accommodation: Yes

Response D: The department thanks the commenter for identifying the error in the statutory reference and for supplying the correct reference. The final text has been amended to correct this typographical error. Regarding the statement that the regulations in section

3413.1 duplicate statute, the Administrative Procedure Act defines a regulation as a rule that "implements, interprets or makes specific the law enforced or administered by it (a state department), or governs its procedure" (GC 11342.600). The department believes that the proposed rules in this section do meet this definition of a regulation and are not duplicative because they make specific certain details of how the department implements the statute. For example, the $150 reimbursement mandated by statue must be in the form of a check or money order made payable to the department in the regulations. The statute is silent on these details. Additionally, when the case of *Fox v. State Personnel Board* (1996) 49 Cal.App.4th 1034, was decided, many employees and members of the public believed that the statutory fees did not apply to peace officers employed by the department. However, these regulations are necessary to clarify that all employees of the department are "state employee[s] obliged by a subpoena to attend as a witness . . . [who has] expertise gained in the course of their duties" and thus the department should be compensated for their testimony under Government Code section 68097.2(b).

Comment E: Commenter contends that if there was a valid need for this proposed regulation, he would expect to find similar regulatory language in the California Code of Regulations covering the California Highway Patrol, Department of Fish and Game, Department of Forestry, and other state agencies who employ Peace Officers who may be called to testify in civil, criminal, and administrative actions. Commenter contends that he finds no such regulations affecting other state agencies and assumes that these agencies rely on the Government Code sections for the administration and management of their agencies. Commenter further contends that making regulations for the sake of making regulations is inappropriate and violates the Administrative Procedures Act.

Accommodation: None.

Response E: The department does not control the regulatory process in other state departments mentioned. However, it is possible that the other departments misinterpreted the Fox case and are continuing to expend tax-payer dollars for witnesses that would otherwise be compensated by the parties issuing the subpoenas. These regulations are necessary to clarify that the statute allows the department to recover those expenditures.

Commenter #2:

Comment A: Commenter represents herself as an attorney for SEIU Local 1000/CSEA. Commenter states that the proposed regulations interfere with an employee organizations ability to use witnesses in administrative hearings or declarants in administrative challenges.

Accommodation: None.

Response A: The department disagrees. The employee organization may continue to use witnesses in administrative hearings or declarants in administrative challenges, as long as there is no valid reason to quash the subpoena and as long as they reimburse the State for taxpayer dollars used to pay for non-percipient witnesses.

Comment B: Commenter states that the proposed regulations make testifying as a specialist based on expertise gained in the course of duties an incompatible activity as defined in section 3413(a), unless the employee notifies the department legal counsel. Commenter states that if an employee failed to give notice to the legal counsel of the department they would be subject to discipline. According to the commenter this language has the

potential to be applied in cases where the union is discussing state operations with department employees who express concerns regarding whether the department is acting properly or not.

Accommodation: None.

Response B: The department contends that the commenter describes an example involving a percipient witness (i.e., the witness has direct and relevant testimony pertaining to the matter in dispute). The regulations apply to non-percipient witnesses, not to witnesses who are being called "to testify regarding an event or transaction which he or she has perceived or investigated . . . or [have] been requested to testify as an expert witness by the department." The regulations relate to a witness who has no direct knowledge of the matter for which he or she is being called to testify. In order for the CDGC to assess whether there is an incompatible activity involved, and whether an attempt should be made to quash the subpoena, it is necessary for the CDGC to know why the individual is being called to testify. That information can be contained in "a synopsis of their anticipated testimony." If the individual is not a percipient witness, then the department, as the employer who is paying to release the individual from service, has a right to know the purpose of the testimony to determine whether there are grounds for quashing the subpoena or seeking reimbursement of compensation. If the employee organization is seeking to call individuals for the purpose of having them provide their opinions gained in their employment and that opinion is contrary to the interests of the department, then their testimony may be an incompatible activity. The regulations will assist in assessing those activities.

Comment C: Commenter contends that the department is intentionally making this regulatory change in order to interfere with union access to employees for the purpose of obtaining information relevant to representation of its members. Commenter further contends that this regulatory change places employees at unnecessary risk of discipline for discussing issues which have risen in state operations about which the employees are familiar. Commenter further contends that the terms "consulting" and "based on expertise gained in the course of their duties" broaden the scope of incompatible activities and will have a chilling affect on employees who speak out about their experience in State government.

Accommodation: None.

Response C: The department disagrees. The reason for the department making these regulatory changes is unrelated to any attempt to interfere with union access to employees. When the case of *Fox v. State Personnel Board* (1996) 49 Cal.App.4th 1034, was decided, many employees and members of the public believed that the statutory fees did not apply to peace officers employed by the department. However, these regulations are necessary to clarify that all employees of the department are "state employee[s] obliged by a subpoena to attend as a witness . . . [who has] expertise gained in the course of their duties" and thus the department should be compensated for their testimony under Government Code section 68097.2(b). To the extent that the union is calling such a witness, reimbursement of taxpayer funds will be required. Additionally, these regulations will not "have a chilling effect on employees speaking about their experience in State Government." There are multiple statutes that preclude the department from retaliating in any manner against such employees. The current regulations are consistent with those statutes.

Comment D: Commenter contends that the language currently contained in 3413(a)(5) and 3413(a)(10) is sufficient and does not interfere with the unions ability to remain informed

about state operations. Therefore the commenter contends that she is opposed to the regulatory change.

Accommodation: None.

Response D: The department disagrees and believes that the changes are necessary to assess whether the employee is engaging in an incompatible activity. Notice is necessary for such an assessment. The employee should not object to such notice and may be deemed to have engaged in such activity, if he or she fails to give notice to the CDGC.

Comment E: Commenter contends that proposed section 3413(a)(10), requires that an employee who is contacted to provide expert witness must disclose the nature of any testimony to department legal counsel. Commenter contends that this regulation does not acknowledge or provide for any protection for employees who have discussed workplace issues with union counsel and who may be covered by attorney-client or attorney work product privileges.

Accommodation: None.

Response E: See this commenter, Response B. Also the department points out that the witnesses addressed by these regulations are not parties to the actions, so the attorney-client privilege would not apply. The interests of the department outweigh any potential that a claim concerning a work product privilege is can be made.

Comment F: Commenter contends that if these regulations are adopted, the union, which commenter represents, will pursue other remedies to overturn them. Commenter contends that she will seek to have the regulations reviewed by the Department Health Care Receiver, due the fact that these regulations raise concerns about how the Receiver can discuss improvements in the health care delivery system with employees without placing the employees at risk of discipline. Commenter contends that more careful work needs to be done on this regulatory change in order to ensure that they do not interfere with the Receiver's authority, the public's right to have information about state operations, the employee's rights of free speech, and the union's rights under the Dills' Act. Commenter further contends that this proposed change goes beyond the department's authority under Penal Code 5058.

Accommodation: None.

Response F: The department welcomes the input of all members of the public, the Legislature, and that of the Receiver and his staff. These regulations have been submitted to the Office of Administrative Law, and have been made available for public comment. Additionally, the Office of the Health Care Receiver did not choose to comment on these regulations.